

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4 JEANNIE NICOLE BRUESCH,

5 Plaintiff,

No. 03:12-cv-01453-HU

6 vs.

7 CAROLYN W. COLVIN<sup>1</sup>,  
Commissioner of Social Security,

**FINDINGS AND RECOMMENDATION**

8 Defendant.  
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26 \_\_\_\_\_  
27 <sup>1</sup>Carolyn W. Colvin became acting Commissioner of Social  
Security on February 24, 2013. Therefore, pursuant to Federal Rule  
28 of Civil Procedure 25(d), she is automatically substituted for  
Michael J. Astrue as Defendant in this case.

HUBEL, United States Magistrate Judge:

The plaintiff Jeannie Nicole Bruesch seeks judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision denying her applications for Disability Insurance ("DI") benefits under Title II of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income ("SSI") benefits under Title XVI of the Act. Bruesch argues the Administrative Law Judge ("ALJ") erred in finding she has a "moderate" limitation in concentration, persistence, and pace, but then failing to include that limitation in the ALJ's residual functional capacity ("RFC") assessment, and in the hypothetical question posed to the Vocational Expert. See Dkt. ##15 & 21.

#### ***I. PROCEDURAL BACKGROUND***

Bruesch filed an application for DI benefits that was denied on June 1, 1998. (A.R. 196<sup>2</sup>) The record contains no evidence that Bruesch requested reconsideration of that denial. She filed a subsequent application sometime in 2002, that was denied initially on January 3, 2003, and on reconsideration on June 24, 2003. ((A.R. 29, 30, 32-42, see A.R. 195) She protectively filed her

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<sup>2</sup>The administrative record ("A.R.") was filed electronically using the court's CM/ECF system. Dkt. #11 and attachments. Pages of the A.R. contain at least three separate page numbers: two located at the top of the page, consisting of the CM/ECF number (e.g., Dkt. #11-1, Page 18 of 132) and a Page ID#; and a page number located at the lower right corner of the page, representing the numbering inserted by the Agency. Some pages also contain a page number inserted by the office supplying the records. Citations herein to "A.R." refer to the agency numbering in the lower right corner of each page.

1 current applications on January 21, 2004.<sup>3</sup> (A.R. 15, 576) Bruesch  
2 claims she has been disabled since June 15, 2002, and she is unable  
3 to work due to abdominal pain, extreme weakness, dizzy spells,  
4 fibromyalgia, chronic back and hip pain, migraine headaches, sleep  
5 apnea, severe fatigue, post-traumatic stress disorder, bipolar dis-  
6 order, anxiety and depression, and a personality disorder. (See  
7 A.R. 15, 17-20, 69, 576, 909-10)

8 Bruesch's current applications were denied initially on  
9 September 17, 2004. (A.R. 31, 43-48). Although no reconsideration  
10 denial appears in the record, Bruesch apparently proceeded through  
11 the reconsideration process because she was granted an ALJ hearing,  
12 which was held on August 9, 2007. (See A.R. 576) On August 17,  
13 2007, an ALJ denied Bruesch's claim. (A.R. 573-86) The Appeals  
14 Council denied review on January 4, 2008 (A.R. 570-72), but then,  
15 two years later (on February 5, 2010), remanded the case to an ALJ  
16 for further proceedings. (A.R. 587-90) In its remand order, the  
17 Appeals Council indicated it had been "unable to take action on  
18 [Bruesch's] request for review at the time it was filed because the  
19 record upon which the [ALJ] based the decision could not be  
20 located." (A.R. 589) This statement is puzzling in light of the  
21 Appeals Council's prior denial of review on January 24, 2008, when  
22 the record apparently was available. (A.R. 570-72)

23 Another ALJ hearing was held on December 6, 2010. (A.R. 906-  
24 52) Bruesch was represented by an attorney at the hearing.

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26 <sup>3</sup>The Commissioner indicates, in her brief, that Bruesch "was  
27 twenty-six years old when she filed her present applications for  
28 benefits[.]" Dkt. #17, p. 2. Actually, Bruesch was born in 1975,  
making her twenty-nine years old on January 21, 2004. (See A.R.  
912) However, the discrepancy is irrelevant to the current review.

1 Witnesses included Bruesch and a Vocational Expert ("VE"). (*Id.*)  
 2 On January 18, 2011, the ALJ issued a decision denying Bruesch's  
 3 applications for benefits. (A.R. 12-28) On July 6, 2012, the  
 4 Appeals Council denied review of the January 18, 2011, ALJ's  
 5 decision (A.R. 5-7), making it the final decision of the Commis-  
 6 sioner. See 20 C.F.R. §§ 404.981, 416.1481.

7 Bruesch filed a timely Complaint in this court seeking  
 8 judicial review of the Commissioner's final decision denying her  
 9 applications for SSI and DI benefits. Dkt. #1. The matter is  
 10 fully briefed, and the undersigned submits the following findings  
 11 and recommended disposition of the case pursuant to 28 U.S.C.  
 12 § 636(b)(1)(B).

## 13 14 **II. FACTUAL BACKGROUND**

15 Only a brief summary of the factual background is necessary to  
 16 establish a framework for evaluation of Bruesch's single assertion  
 17 of error in this case. The evidence indicates Bruesch is 5'5"  
 18 tall, and she is morbidly obese, weighing as much as 278 pounds  
 19 during the period under review. Dkt #15, p. 1; A.R. 17. She is a  
 20 high school graduate, and "completed additional vocational training  
 21 in computing." Dkt. #17, p. 2 (citing A.R. 75). Her past work  
 22 includes fast food jobs; cashier; and office positions including  
 23 receptionist, office manager, and shift manager. *Id.* (citing A.R.  
 24 114, 122, 645-48, 657, 946); Dkt. #15, p. 2. At the time of the  
 25 second ALJ hearing on December 6, 2010, Bruesch was working part-  
 26 time at McDonald's. Dkt. #17, pp. 2-3 (citing A.R. 914-15).

27 The ALJ found Bruesch has severe impairments consisting of:  
 28 "obesity at a height of 65.5 inches and uppermost weight of 278

pounds with an uppermost BMI of 45.7; epidural lipomatosis<sup>4</sup> with central canal stenosis from L4-S1 causing low back pain and bilateral lower extremity radiculopathy, as shown on MRI scan; as well as a bipolar disorder and personality disorder, as diagnosed by a consulting psychiatrist and psychologist[.]” (A.R. 17-18; citations omitted) However, the ALJ found these severe impairments, singly or in combination, do not rise to the Listing level of severity. (A.R. 21)

The ALJ found Bruesch does not have “severe” fibromyalgia under the regulations. The ALJ discussed his rationale for this finding at length, reviewing the diagnostic criteria for the disorder, objective findings by a 2002 treating physician, and inconsistencies in the evidence that caused the ALJ to discount the credibility of Bruesch’s claim that she suffers from severe fibromyalgia. (A.R. 18-19) The ALJ similarly found Bruesch’s migraine headaches and post-traumatic stress disorder are not severe impairments. (A.R. 19-21)

The ALJ assessed Bruesch’s RFC as follows:

After careful consideration of the entire record, the undersigned finds the claimant has obesity and epidural lipomatosis with L4-S1 central canal stenosis that limit her to the performance of light work as defined in 20 CFR 404.1567(b) and 416.967(b) except for standing, walking and sitting each for six hours with the option to change sitting and standing

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<sup>4</sup>“Epidural lipomatosis is a rare disorder in which an abnormal amount of fat is deposited on or outside the lining of the spine. It may press on the spinal cord and nerves.” “Symptoms vary, but back pain and weakness are the most common ones. Other possible signs may be a loss of sensation or reflexes that are too slow or too fast.” Steroid use and obesity are two possible contributors to the disorder. <http://www.cedars-sinai.edu/Patients/Health-Conditions/Epidural-Lipomatosis.aspx> (visited 08/30/13).

positions every 15 to 30 minutes; no climbing of ladder/rope/scaffolds; and occasional stooping, kneeling, . . . crouching and crawling. She has bipolar and personality disorders that limit her to having occasional interaction with co-workers and the public with no teamwork; and understanding, remembering and carrying out unskilled instructions.<sup>5</sup>

(A.R. 22) In evaluating Bruesch's mental impairments, the ALJ found Bruesch "has a bipolar disorder with depressive and manic symptoms" under Listing 12.04, and a personality disorder consisting of "persistent disturbances of mood" under Listing 12.08.

(A.R. 21) Considering the "paragraph B" criteria, the ALJ found Bruesch has mild restriction in her activities of daily living and social functioning; and moderate difficulties with regard to concentration, persistence, or pace. (A.R. 21-22)

In reaching these conclusions regarding Bruesch's mental functional capacity, the ALJ "largely accepted" assessments by Clinical Psychologist Gregory Cole, Ph.D., and an unidentified state-agency consultant. (A.R. 22) Dr. Cole completed a "Medical Source Statement of Ability to do Work-Related Activities (Mental)" regarding Bruesch on April 30, 2007. (A.R. 533-35) Dr. Cole opined Bruesch would have "mild" difficulty in her ability to understand, remember, and carry out complex instructions, and make judgments on complex work-related decisions. (A.R. 533) He opined Bruesch would have "moderate" difficulty in her ability to interact appro-

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<sup>5</sup>The ALJ's statement of Bruesch's RFC is far from a model of clarity. It appears the ALJ was indicating Bruesch can perform light work as long as she has the ability to change positions between sitting and standing every 15 to 30 minutes; she is not required to climb ladders, ropes, or scaffolds; and she is required to stoop, kneel, crouch, and crawl no more than occasionally.

1 appropriately with the public, supervisors, and coworkers, and respond  
2 appropriately to unusual work situations and to changes in a  
3 routine work setting. (A.R. 534) He indicated that none of  
4 Bruesch's other functional abilities would be affected by her  
5 impairments. (*Id.*)

6 The unidentified state-agency consultant performed a records  
7 review on September 16, 2004, and completed a Mental Residual Func-  
8 tional Capacity Assessment form (A.R. 238-41), and a Psychiatric  
9 Review Technique form (A.R. 242-54). The consultant's signature is  
10 mostly illegible, except for the clear indication that the consul-  
11 tant was an "M.D." (See A.R. 242) The consultant opined Bruesch  
12 would be "moderately" limited in her ability to understand, remem-  
13 ber, and carry out detailed instructions; complete a normal workday  
14 and workweek without interruptions from psychologically-based  
15 symptoms; perform at a consistent pace without an unreasonable  
16 number and length of rest periods; interact appropriately with the  
17 general public; accept instructions and respond appropriately to  
18 criticism from supervisors; get along with coworkers or peers with-  
19 out distracting them or exhibiting behavioral extremes; and set  
20 realistic goals or make plans independently of others. (A.R. 238-  
21 39) The consultant indicated Bruesch would vary from no limitation  
22 to a moderate limitation in her ability to sustain an ordinary  
23 routine without special supervision. (A.R. 238)

24 The consultant elaborated on these opinions, as follows:

25 [Bruesch's] [symptoms] of depression would  
26 limit her from carrying out detailed tasks/  
instructions. She will do best [with] simple  
27 repetitive tasks.

28 She will do best [with] occupations only  
requiring superficial contact [with] general

1 public, where she is not likely to be chal-  
2 lenged.

3 She will benefit from [a] patient and under-  
4 standing supervisor who is firm and can set  
5 realistic goals.

6 She will tend to underestimate her own abili-  
7 ties and fixate on her perceived [symptoms] at  
8 times and will benefit from some redirection.

9 (Despite [Bruesch's] obvious [illegible] of  
10 getting on disability benefits [numerous  
11 applications] she appears to be managing her  
12 children and their well-being well con-  
13 sidering.)

14 Based on sum of evidence [Bruesch] should be  
15 capable of performing her [past relevant  
16 work].

17 (A.R. 240)

18 The consultant also opined Bruesch would have mild-to-moderate  
19 difficulties maintaining concentration, persistence, or pace.

20 (A.R. 252) This is consistent with the opinions of two state-  
21 agency consultants who reviewed the record in 2003. (See A.R. 208,  
22 222)

23 The ALJ asked the VE to consider an individual with the  
24 limitations set forth in the ALJ's RFC finding. The VE testified  
25 that someone with those limitations would be unable to perform any  
26 of Bruesch's past relevant work "because all of these jobs involved  
27 frequent interaction with the public and co-workers," and "also  
28 entailed teamwork." (A.R. 26, 946) However, the VE indicated a  
person with those limitations would be able to work as a small  
products assembler, electronics worker, or price marker. (A.R.  
947-48) If the individual "would be unable to maintain attention  
and concentration for extended periods of time," then competitive  
employment likely would not be possible. The VE stated, "I'm not



1 exactly sure what the definition of 'extended periods of time' is.  
 2 My experience is that a person who . . . would be unproductive for  
 3 10 percent or more of the time for whatever reason would be  
 4 precluded from employment." (A.R. 948-49)

5 The ALJ relied on the VE's testimony in determining that  
 6 although Bruesch would be unable to return to any of her past  
 7 relevant work, she would be able to perform the jobs of small  
 8 products assembler, electronics worker, and price marker. The ALJ  
 9 therefore concluded Bruesch had not been under a disability at any  
 10 time from June 15, 2002, through January 18, 2011. (A.R. 26-27)

### 11 12 **III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF**

13 A claimant is disabled if he or she is unable to "engage in  
 14 any substantial gainful activity by reason of any medically  
 15 determinable physical or mental impairment which . . . has lasted  
 16 or can be expected to last for a continuous period of not less than  
 17 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

18 "Social Security Regulations set out a five-step sequential  
 19 process for determining whether an applicant is disabled within the  
 20 meaning of the Social Security Act." *Keyser v. Commissioner*, 648  
 21 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520<sup>6</sup>). The  
 22 *Keyser* court described the five steps in the process as follows:

23 (1) Is the claimant presently working in a  
 24 substantially gainful activity? (2) Is the  
 25 claimant's impairment severe? (3) Does the

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26 <sup>6</sup>Although *Keyser* dealt with an applicant for Disability  
 27 Insurance benefits under Title II of the Social Security Act, the  
 28 identical five-step sequential evaluation process is applied to  
 applications for SSI under Title XVI of the Act. Compare 20 C.F.R.  
 § 404.1520 with 20 C.F.R. § 416.920.

1           impairment meet or equal one of a list of  
2           specific impairments described in the regula-  
3           tions? (4) Is the claimant able to perform  
4           any work that he or she has done in the past?  
5           and (5) Are there significant numbers of jobs  
6           in the national economy that the claimant can  
7           perform?

8           *Keyser*, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,  
9           1098-99 (9th Cir. 1999)); see *Bustamante v. Massanari*, 262 F.3d  
10          949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)  
11          and 416.920 (b)-(f)). The claimant bears the burden of proof for  
12          the first four steps in the process. If the claimant fails to meet  
13          the burden at any of those four steps, then the claimant is not  
14          disabled. *Bustamante*, 262 F.3d at 953-54; see *Bowen v. Yuckert*,  
15          482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119  
16          (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth  
17          general standards for evaluating disability), 404.1566 and 416.966  
18          (describing "work which exists in the national economy"), and  
19          416.960(c) (discussing how a claimant's vocational background  
20          figures into the disability determination).

21          The Commissioner bears the burden of proof at step five of the  
22          process, where the Commissioner must show the claimant can perform  
23          other work that exists in significant numbers in the national  
24          economy, "taking into consideration the claimant's residual  
25          functional capacity, age, education, and work experience." *Tackett*  
26          *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner  
27          fails meet this burden, then the claimant is disabled, but if the  
28          Commissioner proves the claimant is able to perform other work  
29          which exists in the national economy, then the claimant is not

1 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.  
2 §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

3 The ALJ also determines the credibility of the claimant's  
4 testimony regarding his or her symptoms:

5 In deciding whether to admit a claimant's  
6 subjective symptom testimony, the ALJ must  
7 engage in a two-step analysis. *Smolen v.*  
8 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).  
9 Under the first step prescribed by *Smolen*,  
10 . . . the claimant must produce objective  
11 medical evidence of underlying "impairment,"  
12 and must show that the impairment, or a combi-  
13 nation of impairments, "could reasonably be  
14 expected to produce pain or other symptoms."  
15 *Id.* at 1281-82. If this . . . test is satis-  
16 fied, and if the ALJ's credibility analysis of  
17 the claimant's testimony shows no malingering,  
18 then the ALJ may reject the claimant's testi-  
19 mony about severity of symptoms [only] with  
20 "specific findings stating clear and con-  
21 vincing reasons for doing so." *Id.* at 1284.

22 *Batson v. Commissioner*, 359 F.3d 1190, 1196 (9th Cir. 2004).

#### 23 **IV. STANDARD OF REVIEW**

24 The court may set aside a denial of benefits only if the  
25 Commissioner's findings are "'not supported by substantial evidence  
26 or [are] based on legal error.'" *Bray v. Comm'r of Soc. Sec.*  
27 *Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v.*  
28 *Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black*  
29 *V. Comm'r of Soc. Sec. Admin.*, slip op., 2011 WL 1930418, at \*1  
30 (9th Cir. May 20, 2011). Substantial evidence is "'more than a  
31 mere scintilla but less than a preponderance; it is such relevant  
32 evidence as a reasonable mind might accept as adequate to support  
33 a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035,  
34 1039 (9th Cir. 1995)).

The court “cannot affirm the Commissioner’s decision ‘simply by isolating a specific quantum of supporting evidence.’” *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court must consider the entire record, weighing both the evidence that supports the Commissioner’s conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ’s decision must be upheld; the court may not substitute its judgment for the ALJ’s. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

## V. DISCUSSION

Bruesch asserts the ALJ erred in finding she “suffers ‘moderate’ limitations in concentration, persistence, and pace, yet failing to include that limitation in his dispositive hypothetical question [to the VE].” Dkt. #15, p. 2. As discussed above, the ALJ found that “[w]ith regard to concentration, persistence or pace, [Bruesch] has moderate difficulties.” (A.R. 22) The ALJ’s RFC limits Bruesch “to having occasional interaction with co-workers and the public with no teamwork; and understanding, remembering and carrying out unskilled instructions.” (*Id.*) Bruesch argues the limitation to “unskilled instructions” fails to account for a moderate impairment in concentration, persistence, or pace. Dkt. #15, pp. 6-7.

Bruesch relies on *Lubin v. Commissioner*, 507 Fed. Appx. 709 (9th Cir. Feb. 8, 2013) (mem.) (unpublished disposition), where the court held as follows:

12 - FINDINGS & RECOMMENDATION

Although the ALJ found that Lubin suffered moderate difficulties in maintaining concentration, persistence, or pace, the ALJ erred by not including this limitation in the residual functional capacity determination or in the hypothetical question to the vocational expert. The ALJ must include all restrictions in the residual functional capacity determination and the hypothetical question posed to the vocational expert, including moderate limitations in concentration, persistence, or pace. 20 C.F.R. §§ 404.1545, 416.945; *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989).

Limiting Lubin "to one to three step tasks due to pain and prescription drug/marijuana use" did not capture the limitation in concentration, persistence, or pace found by the ALJ. The work described by the vocational expert may still require the speed and concentration Lubin lacks. See *Brink v. Comm'r Soc. Sec. Admin.*, 343 Fed. Appx. 211, 212 (9th Cir. 2009) (unpublished). The hypothetical question should have included Lubin's moderate limitations in concentration, persistence, or pace.

Because the ALJ's hypothetical question to the vocational expert did not reflect all of Lubin's limitations, "the expert's testimony has no evidentiary value to support a finding that [Lubin] can perform jobs in the national economy." *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991).

*Id.*, 507 Fed. Appx. at 712; see *Cruz v. Colvin*, 2013 WL 4082714, at \*9 (C.D. Cal. Aug. 13, 2013) (RFC limiting claimant to "'simple repetitive tasks' . . . did not accommodate [physician's] findings of moderate limitations on [claimant's] ability to concentrate for extended periods, complete a normal workday or workweek without interruption, sustain an ordinary routine, make simple decisions, and perform at a consistent pace"; citing *Lubin, supra*); *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989) ("Hypothetical questions posed to the vocational expert must set out all the limi-

tations and restrictions of the particular claimant. . . .") (emphasis in original; internal quotation marks, citations omitted).

The Commissioner argues *Lubin* "is neither binding nor persuasive authority" on the issue at hand. Dkt. #17, p. 12. The Commissioner argues further that the "pincited page of *Magallanes* [cited by the *Lubin* court] simply states ALJs are 'not bound to accept as true the restrictions presented in a hypothetical question propounded by a claimant's counsel.'" *Id.* (quoting *Magallanes*, 881 F.3d at 756). The Commissioner argues the *Lubin* court failed to address "the seminal published case on this issue," which the Commissioner argues is *Stubbs-Danielson v. Astrue*, 539 F.3d 1169 (9th Cir. 2008).

The page of *Magallanes* cited by the *Lubin* court does not "simply state[]" the finding quoted by the Commissioner; the *Magallanes* court further noted the well-settled law that a hypothetical question posed to a VE must include *all* of a claimant's limitations and restrictions. *Magallanes*, 881 F.3d at 756. However, as an unpublished decision, *Lubin* is not binding precedent. See Ninth Cir. Rule 36-3(a).

The Commissioner also argues Bruesch's "reliance on the paragraph B findings of the psychiatric review technique is misplaced because these findings . . . are relevant only at step three, where the ALJ considers whether a claimant's impairment or combination of impairments meets or equals an impairment that presumptively demonstrates disability." Dkt. #17, p. 9 (citing 20 C.F.R. § 416.920(d); 20 C.F.R. pt. 404, subpt. P, app. 1 (Listings)). The Commissioner maintains the ALJ's analysis at step

1 three "is separate and distinct from the [RFC] assessment." *Id.*  
2 (citing SSR 96-8p, 1996 WL 374184, at \*4).

3 The parties' arguments echo what is becoming a frequent issue  
4 in this and other courts, regarding the relationship between an  
5 ALJ's findings at steps two and three, where the ALJ determines  
6 whether the claimant has a severe impairment that meets or equals  
7 a listed impairment; the RFC, which the ALJ determines at step  
8 four; and whether the hypothetical question posed to a VE must  
9 account for limitations identified in the step two/three inquiry.  
10 The Third, Seventh, Eighth, and Eleventh Circuits have rejected the  
11 Commissioner's position that including limitations found at step  
12 two/three in a hypothetical question would inappropriately conflate  
13 the independent inquiries at steps two/three and step four. See  
14 *Winschel v. Comm'r*, 631 F.3d 1176, 1180 (11th Cir. 2011) (citing  
15 cases from the other Circuits). The *Winschel* court found that  
16 although the two inquiries are "undeniably distinct," nothing in  
17 the regulations "precludes the ALJ from considering" the results of  
18 the step two/three inquiry in his determination of the claimant's  
19 RFC. *Id.*

20 The *Winschel* court went on to explain when an ALJ should be  
21 required to include limitations found at step two in the hypo-  
22 thetical question to the VE. The court first examined how other  
23 circuits have treated the issues, as follows:

24 Other circuits have also rejected the  
25 argument that an ALJ generally accounts for a  
26 claimant's [moderate] limitations in concen-  
27 tration, persistence, and pace by restricting  
28 the hypothetical question to simple, routine  
tasks or unskilled work. See *Stewart v.*  
*Astrue*, 561 F.3d 679, 685-85 (7th Cir. 2009)  
(*per curiam*); *Ramirez [v. Barnhart]*, 372 F.3d  
[546,] 554 [(3d Cir. 2004)]; *Newton [v.*

Chater], 92 F.3d [688,] 695 [(8th Cir. 1996)]. But when medical evidence demonstrates that a claimant can engage in simple, routine tasks or unskilled work despite limitations in concentration, persistence, and pace, courts have concluded that limiting the hypothetical to include only unskilled work sufficiently accounts for such limitations. See *Simila v. Astrue*, 573 F.3d 503, 521-22 (7th Cir. 2009); *Stubbe-Danielson v. Astrue*, 539 F.3d 1169, 1173-76 (9th Cir. 2008); *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001). Additionally, other circuits have held that hypothetical questions adequately account for a claimant's limitations in concentration, persistence, and pace when the questions otherwise implicitly account for these limitations. See *White v. Comm'r of Soc. Sec.*, 572 F.3d 272, 288 (6th Cir. 2009) (concluding that the ALJ's reference to a moderate limitation in maintaining "attention and concentration" sufficiently represented the claimant's limitations in concentration, persistence, and pace); *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002) (concluding that the hypothetical question adequately incorporated the claimant's limitations in concentration, persistence, and pace when the ALJ instructed the vocational expert to credit fully medical testimony related to those limitations).

*Winschel*, 631 F.3d at 1180-81. The court noted that despite finding, at step two, that "Winschel's mental impairments caused a moderate limitation in maintaining concentration, persistence, and pace[,]" the ALJ neither found the "medical evidence suggested Winschel's ability to work was unaffected by this limitation, nor did he otherwise implicitly account for the limitation in the hypothetical." *Id.*, 631 F.3d at 1181. Thus, the court held "the ALJ should have explicitly included the limitation in his hypothetical question to the vocational expert." *Id.*

"A hypothetical question posed to a vocational expert must include all of the claimant's functional limitations, both physical and mental.'" *Brink v. Comm'r*, 343 Fed. Appx. 211, 212 (9th



1 Cir. 2009) (quoting *Flores v. Shalala*, 49 F.3d 562, 570 (9th Cir.  
 2 1995)). "Where the ALJ credits the opinion of a physician, the ALJ  
 3 must translate the plaintiff's condition as described in the phy-  
 4 sician's opinion into functional limitations in the RFC."  
 5 *Amanti v. Comm'r*, 2012 WL 5879530, at \*5 (D. Or. Nov. 19, 2012)  
 6 (Marsh, J); see *Brink*, 343 Fed. Appx. at 212 (ALJ erred in failing  
 7 to include, in hypothetical question, medical opinion accepted by  
 8 ALJ regarding claimant's limitations). Here, the ALJ "largely  
 9 accepted" the assessment of the unidentified state-agency consult-  
 10 ant, who found Bruesch would have moderate difficulties in, among  
 11 other things, completing a normal workday and workweek without  
 12 interruptions from psychologically-based symptoms, and performing  
 13 at a consistent pace without an unreasonable number and length of  
 14 rest periods. The issue, then, is whether the ALJ's RFC assessm-  
 15 ent, which limits Bruesch to "understanding, remembering and  
 16 carrying out unskilled instructions" sufficiently translates the  
 17 medical opinion into functional limitations in the RFC. See  
 18 *Amanti, supra*. "An ALJ's assessment of a claimant adequately cap-  
 19 tures restrictions related to concentration, persistence, or pace  
 20 where the assessment is consistent with restrictions identified in  
 21 the medical testimony." *Stubbs-Danielson*, 539 F.3d at 1174.

22 In *Bickford v. Astrue*, 2010 WL 4220531, at \*11-12 (D. Or.  
 23 Oct. 19, 2010), Judge King of this court noted the cases differ on  
 24 whether an individual "who suffers from moderate difficulties in  
 25 concentration can perform simple, repetitive tasks." *Id.*, at \*11  
 26 (citing *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir.  
 27 2008); *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001)).  
 28 Judge King held, "In short, so long as the ALJ's decision is

1 supported by medical evidence, a limitation to simple, repetitive  
2 work can account for moderate difficulties in concentration,  
3 persistence or pace." *Id.*; see *Brink*, 2013 WL 1785803, at \*7  
4 ("[T]he ALJ translated plaintiff's moderate limitation in concen-  
5 tration, persistence, or pace into the only concrete restriction -  
6 i.e. for simple, repetitive tasks of one to three steps - outlined  
7 in the medical evidence.").

8 The court finds that limiting Bruesch to "unskilled instruc-  
9 tions" adequately incorporates moderate limitations in concen-  
10 tration, persistence, or pace. Unskilled work, by definition,  
11 consists of "routine, repetitive tasks, [and] simple instructions."  
12 *Rodriguez v. Comm'r*, slip op., 2013 WL 4521138, at \*7 (D. Or.  
13 Aug. 26, 2013) (Marsh, J). The medical evidence upon which the ALJ  
14 relied supports the conclusion that Bruesch is capable of per-  
15 forming unskilled work. Her part-time job at McDonald's is further  
16 evidence in support of the ALJ's decision. Therefore, the  
17 Commissioner's decision should be affirmed.

## 18 19 20 **VI. CONCLUSION**

21 For the reasons discussed above, the undersigned recommends  
22 the Commissioner's decision be affirmed.

## 23 24 **VII. SCHEDULING ORDER**

25 These Findings and Recommendations will be referred to a  
26 district judge. Objections, if any, are due by **December 10, 2013**.  
27 If no objections are filed, then the Findings and Recommendations  
28 will go under advisement on that date. If objections are filed,

1 then any response is due by **December 27, 2013**. By the earlier of  
2 the response due date or the date a response is filed, the Findings  
3 and Recommendations will go under advisement.

4 IT IS SO ORDERED.

5 Dated this 22nd day of November, 2013.

6  
7 /s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge